IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
	:	**CRIMINAL NUMBER 99-180**
v.	:	
	:	
	:	
RICHARD IRIZARRY	:	

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

The United States of America, by its attorneys, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, and Floyd J. Miller, Assistant United States Attorney for the district, moves the Court pursuant to Rule 30 of the Federal Rules of Criminal Procedure, to give the following jury instructions in addition to the standard instructions, and further requests leave to file any supplemental instructions as may appear necessary and proper. Modified standard instructions are so noted.

Respectfully submitted,

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United States Attorney

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Chief, Firearms & Arson Section
Assistant United States Attorney

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Table of Government's Proposed Instructions

GOVERNMENT'S PROPOSED INSTRUCTION NO. 1

Summary of Indictment

Count One of the Indictment charges that on about October 31, 1998 in Philadelphia, in the Eastern District of Pennsylvania, defendant RICHARD IRIZARRY, having previously been convicted in a court of the Commonwealth of Pennsylvania of a crime punishable by imprisonment for a term exceeding one year, knowingly possessed in and affecting commerce, a 9 millimeter Luger semi-automatic pistol, with an obliterated serial number, loaded with four rounds of ammunition in violation of Title 18, United States Code, Section 922(g)(1).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 2

Statute Involved - Count One

Title 18, United States Code, Section 922(g)(1) provides that "[i]t shall be unlawful for any person: (1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year. . . to . . . possess in or affecting commerce, any firearm or ammunition." (18 U.S.C. §922(g)(1)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 3

Possession of a Firearm by a Convicted Felon - Essential Elements

In order to find the defendant guilty of violating Section 922(g)(1), you must find that the government presented evidence which proved the following elements beyond a reasonable doubt:

First: That the defendant has been convicted of a crime punishable by imprisonment for a term exceeding one year;

Second: The defendant knowingly possessed a firearm; and

Third: Such possession was in or affected interstate or foreign commerce.

(2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions, §36.09 (4th ed. 1990)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 4

Firearm - Defined

A firearm is defined by law as: "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (c) any firearm muffler or firearm silencer; or (D) any destructive device. . . ".

(Title 18, United States Code, Section 921(a)(3)); 2 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions, §36.11 (4th ed. 1990)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 5

Prior Conviction - Defined

The government must prove that the defendant was previously convicted of a crime punishable by more than one year of imprisonment. Proof of this element can be established by either a stipulation (i.e., an agreement) between the government and the defendant or by other evidence.

To satisfy this element, you need only find that the defendant was, in fact, convicted of a crime which was punishable by imprisonment of more than one year and that the conviction was prior to the defendant's possession of the firearm as charged in Count One of the Indictment. The government need not prove that the defendant knew that his prior conviction was punishable by a term of imprisonment exceeding one year.

United States v. Goodie, 524 F.2d 515, 517-18 (5th Cir. 1975), cert. denied, 425 U.S. 905 (1976); United States v. Thomas, 484 F.2d 99 (6th Cir. 1973), cert. denied, 415 U.S. 924 (1974).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 6

Knowing Possession of a Firearm - Defined

The government must prove that the defendant "knowingly possessed" a firearm on or about the date charged in the indictment. An act is done "knowingly" if the defendant was conscious and aware of his action, realized what he was doing or what was happening around him, and did not act because of mistake or accident or other innocent reasons.

The government does not have to prove that the defendant knew that the firearm had passed in commerce or that the possession of a firearm was a violation of the law. The only knowledge that the government must prove is that the defendant "knowingly possessed" the firearm and held it for any amount of time. The length of time of his possession does not matter. That the possession may have been momentary or fleeting is irrelevant.

Knowledge ordinarily is not proved directly because there is no way of seeing into a person's mind. Knowledge may be inferred from a combination of actions although a particular fact -- standing alone -- may seem unimportant. You may infer a defendant's knowledge from the surrounding circumstances in evidence, including the exhibits admitted into evidence in this case, in order to determine whether or not the defendant's possession was "knowing."

(1 Devitt, Blackmar & O'Malley, Federal Jury Practice and Instructions, §17.04 (4th ed. 1990); United States v. Garrett, 574 F.2d 778, 783, n.5 (3d Cir.), cert. denied, 436 U.S. 919 (1978)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 7

Interstate Commerce - Defined

The government must present evidence which proves that the defendant possessed a firearm in interstate commerce. Commerce means travel, trade, traffic, transportation or communications between any place in a state. You must determine whether possession of the firearm at the time and place alleged in the indictment had a demonstrated connection or link with interstate commerce.

In this case, Count One (1) of the Indictment alleges that the defendant knowingly possessed, in and affecting commerce, a firearm. The government may meet its burden of proving this element if it demonstrates that the firearm the defendant is alleged to have possessed "traveled" in interstate commerce, that is, from one state to another. The government does not have to prove that the defendant himself crossed state lines. That is to say, the government does not have to prove that the defendant himself crossed state lines in order to obtain possession of the firearm charged in the indictment. Instead, the government may satisfy its burden as to this element by proving that the firearm passed from a state, other than Pennsylvania, some time prior to the time that the defendant allegedly possessed it in Pennsylvania.

Put another way, the government only needs to show that at some point in time, the firearm the defendant is charged with possessing, was physically located "outside" of the Commonwealth of Pennsylvania. It is no defense that the defendant did not know that the firearm traveled in interstate commerce before it entered the Commonwealth of Pennsylvania. The government also need not prove how the firearm got from one state to another state, or that the defendant himself personally transported the firearm in question. All the government must show is that at some point prior to the defendant's possession of the firearm, it was somewhere outside of the Commonwealth

of Pennsylvania. You may find that the interstate or foreign commerce element has been established if you find beyond a reasonable doubt that the firearm the defendant is alleged to have possessed was manufactured outside the Commonwealth of Pennsylvania.

United States v. Anges, 453 F. Supp. 1256, 1259-60 (E.D. Pa. 1978), aff'd mem., 601 F.2d 576 (3d Cir.), cert. denied, 444 U.S. 944 (1979)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 8
Evidence Received in the Case -
Stipulations, Judicial Notice and Inferences Permitted

The evidence in this case consists of: (a) the sworn testimony of the witnesses, regardless of who may have called them; (b) all exhibits received in evidence, regardless of who may have produced them; (c) all facts which may have been agreed to or stipulated; and (d) all facts and events which may have been judicially noticed.

When the attorneys on both sides stipulate or agree as to the existence of a fact, you should accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts. When the Court declares that it has taken judicial notice of certain facts or events, you may accept the Court's declaration as evidence and regard as proved the fact or event which has been judicially noticed. You are not required to do so, however, since you are the sole judge of the facts. Any proposed testimony or proposed exhibit to which an objection was sustained by the Court, and any testimony or exhibit ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom is not proper evidence and must be entirely disregarded. Questions, objections, statements, and arguments of counsel are not evidence in the case (unless made as an admission or stipulation of fact).

You are to base your verdict only on the evidence received in the case. In your consideration of the evidence received, however, you are not limited to the bald statements of the witnesses, or to the bald assertions in the exhibits. In other words, you are not limited solely to what you see and

hear the witnesses testify to or the exhibits that were admitted into evidence.

Instead, you are also permitted to draw from the facts which you find have been proved such reasonable inference as you feel are justified in the light of your experience and common sense.

(1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, §12.03 (4th ed. 1992)). United States v. Cornish, 103 F.3d 302, 304 (3rd Cir. 1997).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 9

Direct and Circumstantial Evidence

There are two types of evidence which are generally presented during a trial -- direct evidence and circumstantial evidence. Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact such as an eyewitness. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case. After weighing all the evidence, if you are not convinced of the guilt of the defendant beyond a reasonable doubt, you must find him not guilty.

(1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, §12.04 (4th ed. 1992)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 10

Presumption of Innocence, Burden of Proof, and Reasonable Doubt

I instruct you that you must presume the defendant to be innocent of the crime for which he has been charged. Thus the defendant, although accused of crime in the indictment, begins the trial with a "clean slate" -- with no evidence against him. The law permits nothing but legal evidence presented before the jury in court to be considered in support of any charge against the defendant. The presumption of innocence alone, therefore, is sufficient to acquit the defendant.

The burden is always upon the prosecution to prove guilt beyond a reasonable doubt. This burden never shifts to a defendant for the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence. The defendant is not even obligated to produce any evidence by cross-examining the witnesses for the government.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense -- the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs.

Unless the government proves, beyond a reasonable doubt, that the defendant has committed each and every element of the offense charged in the indictment, you must find the defendant not guilty of the offense. If the jury views the evidence in the case as reasonably permitting either of two conclusions -- one of innocence, the other of guilty -- the jury must, of course, adopt the conclusion

of innocence.

(1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, §12.10 (4th ed. 1992)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 11

Credibility of Witnesses - Generally

You, as jurors, are the sole and exclusive judges of the credibility of each of the witnesses called to testify in this case and only you determine the importance or the weight that their testimony deserves. After making your assessment concerning the credibility of a witness, you may decide to believe all of that witness' testimony, only a portion of it, or none of it.

In making your assessment, you should carefully scrutinize all of the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to show whether a witness in your opinion is worthy of belief. Consider each witness's intelligence, motive to falsify, state of mind, appearance, and manner while on the witness stand. Consider the witness's ability to observe the matters as to which he or she has testified and consider whether he or she impresses you as having an accurate memory or recollection of these matters. Consider also any relation a witness may bear to either side of the case, the manner in which each witness might be affected by your verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. An innocent mis-recollection, or a failure to recall, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance, or an insignificant detail, and consider whether the discrepancy results from innocent error or from intentional falsehood.

After making your own judgement or assessment concerning the believability of a witness, you can then attach such importance or weight to that testimony, if any, that you feel it deserves. You will then be in a position to decide whether the government has proven the charge beyond a reasonable doubt.

(1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, §15.01 (4th ed. 1992).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 12

Proof of Knowledge or Intent

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew, or what a person intended at a particular time, you may consider any statements made or acts done or omitted by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent. You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during this trial.

(1 Devitt, Blackmar, Wolff and O'Malley, Federal Jury Practice and Instructions, §17.07 (4th ed. 1992)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 13

Entire Evidence Should Be Considered

Earlier in these instructions, I told you what the essential elements are for the offense charged. Let me emphasize to you now, however, that it is these essential elements that the government must prove. The government need not prove every fact alleged in the Indictment.

In considering the evidence, it should not be viewed in fragmentary parts as though each fact or consideration stands apart from the others. Instead, you should consider the entire body evidence admitted during the trial as well as the weight which should be accorded that evidence.

(1 Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions, §11.15 (3d Cir. 1977); United States v. Manning, 448 F.2d 992, 999 (2d Cir.), cert. denied, 404 U.S. 995 (1971); United States v. Bottone, 365 F.2d 389, 392 (2d Cir.), cert. denied, 385 U.S. 947 (1966)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 14

Intent v. Motive

You should not confuse intent and motive. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted. Personal advancement and financial gain are two well-recognized motives for human conduct. These laudable motives may prompt one person to voluntary acts of good, another to voluntary acts of crime.

Good motive alone is never a defense where the act done or omitted is a crime. So, the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent.

(1 Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions, §17.06 (4th ed. 1992)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 15

If Defendant Does Not Testify:
Defendant Not Required To Testify

The law does not compel a defendant in a criminal case to take the witness stand and testify. If a defendant elects not to testify, no presumption of guilt arises from this decision, and no inference of any kind may be drawn from the fact that the defendant has not testified.

The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

(1 Devitt and Blackmar, Federal Jury Practice and Instructions, §17.14 (3d ed. 1991 supplement)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 16

Absence of Witnesses/Documents

Although the government is required to prove the defendant guilty beyond a reasonable doubt, the government is not, in fact, required to produce all possible documents related to the case or all witnesses who may have some knowledge about the facts of the case.

(1 Devitt & Blackmar, Federal Jury Practice and Instructions, §17.18 (3d ed. 1977)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 17

"On or About"

In your deliberations, you will discover something about the indictment that might seem peculiar to you. The indictment charges that the crime specified was omitted "on or about" a certain date rather than "on" a certain date. The explanation of the use of the words "on or about" is that the proof need not establish with certainty the exact date of any alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that an offense was committed on a date reasonably near the date alleged.

(1 Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions, §13.05 (4th ed. 1992)).

GOVERNMENT'S PROPOSED INSTRUCTION NO. 18

Penalty Not To Be Considered

The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

(1 Devitt, Blackmar, Wolff & O'Malley, Federal Jury Practice and Instructions, §20.01 (4th ed. 1992); United States v. Alvarez, 519 F.2d 1036, 1047-48 (3d Cir. 1975)).

CERTIFICATE OF SERVICE

I certify that on this_____day of _____, 1999, I caused a true and correct copy of the foregoing Government's Proposed Jury Instructions to be serve by United States Mail upon the following:

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